IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 24815/11

In the matter between:

DOHNAVIN ARTHUR WILSNACH	Plaintiff

And

REAGAN GILMORE	1st Defendant
BRENDA FELICIA GILLMORE	2nd Defendant
MALLORY ANTHONY FISHER	3rd Defendant
CRAIG HERMAN JOSEPHS	4th Defendant
CHRIS BOTHA	5th Defendant
THE REGISTRAR OF DEEDS	6th Defendant
FIRST RAND BANK LIMITED	7th Defendant

Coram: Yekiso, J
Dates of Hearing: 2, 3, 4, 5, 23 June, 7 & 31 July 2014
Date of Judgment: May 2015

JUDGMENT

<u>YEKISO, J</u>

[1] The plaintiff, Dohnavin Arthur Wilsnach, a 48 year old male person, was, up until 28 July 2009, the owner of a certain property situate at and commonly known as 25

Dahlia Street, Idas Valley, Stellenbosch. The property was bequeathed to him by his mother who died in 2007 on the specific condition that the property would not form part of a marriage in community of property subsisting between the plaintiff and his spouse and on a further stipulation that in the event of the plaintiff predeceasing her, the property would devolve to plaintiff's youngest daughter, Gulldrine Theresa Wilsnach.

[2] The plaintiff had, up until about May 2009, been employed by a firm of panelbeaters in Stellenbosch. It was during this period that plaintiff was retrenched and, consequently, lost his employment. He lost his employment at a time he had serious financial difficulties. He was constantly harassed by his creditors, some of whom had already obtained default judgment against him. Because his name was listed in the credit bureau he could not access any form of a loan in order to alleviate his financial difficulties. Sometime during May 2009 he responded to an advertisement which appeared in "Die Son" newspaper. The advertisement was placed by a cash loan corporate entity, a close corporation carrying on business under the name and style of MC Probonds CC (MC Probonds). He contacted MC Probonds whereafter he was visited, at his residence at 25 Dahlia Street, Idas Valley, Stellenbosch, by Mallory Anthony Fisher ("Fisher") and Craig Herman Josephs ("Josephs"). Fisher and Josephs were members of MC Probonds each holding a 50% membership share.

[3] At the plaintiff's place of residence the plaintiff, Fisher and Josephs, the two representing MC Probonds, concluded a partly written and a partly oral agreement. The material terms of the agreement were that MC Probonds would advance the plaintiff a

loan in an amount of R186,000-00; as security for the loan so advanced, MC Probonds would take transfer of the plaintiff's property; the loan would be repayable within a period of three to six months; MC Probonds undertook not to alienate the property whilst registered in its name; and once an amount of R186,000-00 shall have been paid the property would be transferred back to the plaintiff. The material portion of the agreement reads as follows:

> " **AGREEMENT & ARRANGEMENT ENTERED INTO AND BETWEEN**
>
> MC PROBONDS CC t/a MC PROBONDS
> Of 16 Hawk Crescent Rocklands, Mitchells Plain, 7785
>
> &
>
> DOHNAVIN ARTHUR & LORENDALL MAGDALENE WILSNACH
> Of 25 Dahlia Street, IdasValley, Stellenbosch, Erf No.6 6411
>
> Property situate at 25 Dahlia Street, Idas Valley, Stellenbosch, with erf no. 6411, will hereby be registered in the name of MC Probonds, for a period of 3 to 6 months, after which property will be transferred back to occupants.
>
> Occupants shall remain on the above property, with their rights to exercise property as they wish, without interference from MC Probonds.
>
> MC Probonds waive the rights to claim such property for themselves including the right to sell or lease such property.
>
> Transfer from MC Probonds to occupants will take place within 3 to 6 months.
>
> On behalf of MC PROBONDS
>
> signed __________ signed __________
> C.H. JOSEPHS D.A. WILSNACH
>
> signed __________ signed __________
> M.A. FISHER L.M. WILSNACH "

[4] Evidence tends to suggest that MC Probonds is no longer carrying on business. Information from the Companies & Intellectual Property Commission ("CIPRO")

indicates that MC Probonds was deregistered in 2011. It has no existing offices and has no contact details. Its members, Fisher and Josephs, are nowhere to be found. But what is clear on the basis of information obtained from CIPRO is that both Fisher and Josephs were indeed members of MC Probonds each holding a 50% membership share.

[5] Subsequent to the conclusion of the agreement referred to in paragraph [3] above, Fisher and Josephs once again called at plaintiff's place of residence. On this occasion the plaintiff and his spouse were requested to sign a further document. According to plaintiff certain portions of the document they were requested to sign were blank and some portions were concealed. The plaintiff states in his evidence that both Fisher and Josephs claimed to have been in a hurry as they still needed to proceed to Wellington to conclude a similar business. He states in his evidence that he was not afforded an opportunity to peruse the document. At the time he signed the document he was under the impression that it related to the loan that was going to be advanced to him by MC Probonds.

[6] It subsequently turned out that the document the plaintiff, and his spouse, were required to sign had nothing to do with the anticipated loan to be advanced by MC Probonds. It was an offer to purchase which, on acceptance, would constitute a deed of sale. In this document the purchase price is indicated to have been in an amount of R350,000-00 inclusive of costs of transfer. This is despite the fact that the amount of

loan the plaintiff sought was in an amount of R186,000-00. The document was signed at Stellenbosch on 6 May 2009.

[7] The document so signed purports to be a deed of sale concluded between the plaintiff and his spouse and one Reagan Gillmore and Brenda Felicia Gillmore. The plaintiff did not know the Gillmores and had never met them before. The plaintiff states in his evidence that under no circumstances could he have agreed to conclude an agreement to sell his property on the terms stated in the purported deed of sale. He had never intended to permanently alienate his property and, in doing so, agree to be liable for costs of transfer.

[8] Few days after the document was signed, the plaintiff, together with his spouse, were taken by Fisher and Josephs to the offices of C George Attorneys, the latter being a firm of attorneys and conveyancers carrying on practice in Mitchells Plain. At the aforementioned firm of attorneys the plaintiff, together with his spouse, were caused to sign several documents. The plaintiff states in his evidence that these documents were not properly explained to him. When he signed the documents he was under the impression that he was signing documents to facilitate a transaction arising from the loan agreement concluded between him and MC Probonds. It subsequently turned out that the documents which the plaintiff was required to sign, which included a power of attorney, were documents intended to facilitate transfer of plaintiff’s property to the Gillmores.

[9] It further transpires on the basis of some of the documents in the bundle of documents handed in as exhibit "B" that on 2 June 2009 plaintiff, together with his spouse, concluded yet a further agreement. It is an agreement purportedly concluded between Reagan Gillmore and plaintiff. It is co-signed by plaintiff's wife. The agreement provides that there would be a shortfall of R70,000-00 in respect of a home loan that the buyer had applied for and that the purchaser would pay the shortfall. It concludes by stating that the agreement constitutes a valid agreement between the parties. It is dated at Mitchells Plain, 2 June 2009. Although the agreement is co-signed by plaintiff's wife, it is not signed by Reagan Gillmore.

[10] On the same date, this being, 2 June 2009, and still on the basis of the bundle of documents handed in as exhibit "B", the plaintiff appears to have signed yet a further document. The document is addressed to C George Attorneys, Mitchells Plain and it bears the heading "To Whom It May Concern". The document reads "I/We hereby instruct C George Attorneys to deposit all monies into the cheque account of C H Josephs with account number 07366601" The plaintiff is the sole signatory of this document.

[11] Subsequent to the signature of the documents referred to in the preceding paragraphs it appears, still on the basis of the bundle of documents handed in as exhibit "B", that various amounts were advanced to the plaintiff. On 11 June 2009 an amount of R20,000-00 was deposited into Standard Bank account number 277392802. The holder of this account is MC Probonds which is obviously controlled by Fisher and

Josephs. On 24 June 2009 an amount of R7,000-00 was deposited into the Standard Bank account number 278292550. On 3 July 2009 a further amount of R5,000-00 was deposited into the same account. And, finally, on 13 July 2009 a further amount of R3,000-00 was deposited into the same account. The holder of this account is plaintiff's wife, Lorindall Magdalane Wilsnach. Mr Clinton George, an attorney and the proprietor of the firm C George Attorneys, who testified at trial, stated in his evidence that all the advance payments and all other disbursements were paid out of the business account of his firm.

[12] Various other disbursements were paid in the course of dealing with the matter, these being an amount of R400-90 paid in respect of a beetle certificate; an amount of R2,310-26 in respect of rates and taxes; and a further amount of R1,170-00 in respect of electrical certificate. As has already been pointed out, all these amounts were paid out of the business account of C George Attorneys.

[13] The contents of the file relating to the transfer of the property by C George Attorneys were discovered. The contents thereof, as well as the file cover, were handed in as exhibit "B". Several attendances relating to this matter are noted on the file cover. On the cover of the file, it is noted that the transfer documents were lodged with the registrar of deeds on 8 July 2009. The note on the cover of the file further indicates that on 20 July 2009 plaintiff was advised of a shortfall in an amount of R70,000-00. The note on the cover reads as follows: "Advised seller of shortfall. Gillmore to pay R70,000-00. Seller confirms and accepts R280,000-00." It is further

noted on the cover that registration into the names of the purchasers went through on 29 July 2009 and that plaintiff, as the seller, as well as plaintiff's agents, were advised of this fact.

[14] Once registration into the names of the purchasers had gone through C George Attorneys accounted to the plaintiff. The statement of account is dated 30 July 2009. It is addressed to a Mr D A & L M Wilsnach. No postal or physical address is stated in the statement of account. The amount due to plaintiff is R156,794-74. The aforementioned amount was deposited into the account of plaintiff's wife on 31 July 2009. C George Attorneys attended to both the transfer of the property from plaintiff to the Gillmores as well as the registration of the bond in favour of FNB.

[15] The Gillmores did not service the bond with FNB. As a consequence of this default, FNB, through its attorneys of record, issued summons against the Gillmores for the recovery of an amount of R299,999-58. The summons was issued on 28 December 2009, a period of somewhat 5 months after registration of the property into the name of the Gillmores and the bond in favour of FNB. The summons was served on the chosen *domicilium citandi et executandi* of the Gillmores, it being no 12 Canna Street, Lentegeur, Mitchells Plain. The summons was served on 28 January 2010. On 21 April 2010 the bank obtained default judgment against the Gillmores, the property having simultaneously been declared executable. The property was due to be sold in execution on Wednesday, 10 November 2010 but the sale in execution did not proceed

due to the intervention of one Chris Botha who, so it was suggested in evidence at trial, settled the arrears.

[16] On 10 January 2011 the Gillmores instituted eviction proceedings against the plaintiff out of the magistrate's court, Stellenbosch. The Gillmores sought the eviction of the plaintiff from the property on the basis that the plaintiff is in unlawful occupation thereof. Whilst the proceedings in the magistrate's court, Stellenbosch were pending, the bank recommenced the process to have the property sold in execution, ostensibly because whilst the Gillmores were seeking the eviction of the plaintiff from the property, the bond was not being serviced in the process. In order to prevent the property being sold in execution, the plaintiff instituted urgent proceedings out of this court under case number 17785/11 for an order restraining the bank from proceeding with the proposed sale in execution and the stay of eviction proceedings in the magistrate's court, Stellenbosch pending the hearing of action to be instituted by plaintiff.

[17] The urgent proceedings referred to in the preceding paragraph were argued before Ndita J. Once Ndita J had heard the parties, she granted the relief sought, effectively restraining the bank from proceeding with the sale in execution of the property, the order being subject to the specific condition that plaintiff institutes the contemplated action within a period of thirty (30) days from the date of granting of the order. The order was granted on 9 November 2011 and the contemplated action was instituted out of this court on 7 December 2011 under case number 24815/2011. In that action Reagan Gillmore and Brenda Felicia Gillmore have been cited as the first and the

second defendant, respectively; Mallory Anthony Fisher and Craig Herman Jospehs have been cited as the third and the fourth defendant, respectively. Chris Botha, who, it appears on the basis of the evidence, had made payment to the bank in order to settle the arrears at the time such payment was made and thereby prevented a previous sale in execution and had, in the process, shown interest in purchasing the property, is cited as the fifth defendant; whilst the registrar of deeds and the bank, Firstrand Bank Limited, have been cited as the sixth and the seventh defendant, respectively.

[18] In that action, and as against the third and the fourth defendant (Fisher and Josephs, respectively), plaintiff seeks an order declaring the agreement concluded at his residence between him and the third and the fourth defendant to be declared invalid*;* similarly, as against the first and the second defendant (the Gillmores), the plaintiff seeks an order declaring the purported deed of sale alleged to have been concluded between him and the first and the second defendant, invalid and void *ab origine;* restitution of the performance, which includes a directive that the property purportedly sold and transferred to the first and the second defendant, be restored to the plaintiff; in the alternative, payment of damages in an amount of R207,800.00 together with interest thereon at the rate of 15,5% per annum *a tempore morae* from date of demand upto date of payment; and costs of suit as against first to the fourth defendants. Although the summons was properly served on all the defendants, only the seventh defendant, Firstrand Bank Limited, entered an appearance to defend.

[19] The plaintiff's cause of action is based thereon that the third and the fourth defendants breached the agreement concluded between the third and the fourth defendant (Fisher and Josephs, respectively) and the plaintiff at the latter's place of residence in that they failed to honour their undertaking that the property would not be sold and thus alienated to a third party; and that the third and the fourth defendant fraudulently misrepresented to the plaintiff that the document the plaintiff was required to sign at his residence on 6 May 2009 (the purported deed of sale) was a document intended to facilitate the required loan whereas, in fact, the document turned out to be a deed of sale concluded between the plaintiff and his wife and the Gillmores, the first and the second defendant.

EVIDENCE IN THIS COURT

[20] Six witnesses were called to testify in these proceedings, these being: plaintiff; plaintiff's wife, Lorindall Magdalene Wilsnach; Mr Clinton George, an attorney who attended to the transfer of the property and the registration of the bond; Mr Dewald Roux, a consultant employed at FNB; Christelle Adonis and Crystal van der Westhuizen, both employed at C George Attroneys.

THE EVIDENCE OF THE PLAINTIFF

[21] The salient features of the plaintiff's evidence is simply that in response to the advertisement which appeared in "Die Son" newspaper he telephoned MC Probonds whereafter he was visited by Fisher and Josephs, the third and the fourth defendants in these proceedings, respectively. After a discussion at the plaintiff's residence with

regards to the service MC Probonds provides, the parties concluded a partly oral and partly written agreement. The written part of the agreement has been cited in full in paragraph [3] of this judgment. The written part of that agreement provides that the property would be registered in the name of MC Probonds, for a period of three to six months, and after that period shall have lapsed, the property would be transferred back to the plaintiff. The agreement further provides that MC Probonds waives the right to claim such property for themselves including the right to sell or lease such property. Based on this provision of the contract, plaintiff understood that the property would not be sold or alienated to a third party. Plaintiff's wife, Lorindall Magdalene Wilsnach, was present and participated in these discussions.

[22] The plaintiff's understanding of the agreement, so the plaintiff stated in his evidence, was that MC Probonds would obtain a loan on his behalf from the bank. He would have to repay the loan in an amount of approximately R2,500-00 per month but that, for the first six months after the granting of the loan, MC Probonds would service the loan on his behalf. He confirms having signed a series of other documents subsequent to the conclusion of the agreement. These documents included a document which later turned out to be a deed of sale concluded between him and Reagan Gillmore and his mother, Brenda Felicia Gillmore. His evidence is that there were portions of the document which were incomplete and other portions concealed from him and his wife. In particular, those portions in which the particulars of the purchasers have been filed in, were incomplete when the document was signed. The impression conveyed to him was that the document they were called upon to sign was

to facilitate the provision of a loan to be advanced by MC Probonds. The contents of the document were not explained to them. They were asked to sign the document without delay as Fisher and Josephs were in a hurry to go to Wellington to conclude a similar business.

[23] Subsequent to the signature of the documents referred to in the preceding paragraph, the plaintiff and his wife were taken through by Fisher and Josephs to an attorney's office in Mitchells Plain, C George Attorneys, where they were required to sign further documents. The plaintiff's evidence is that the documents the plaintiff was called upon to sign at the aforementioned firm of attorneys were not explained to him nor was he apprised of the contents thereof. In signing such documents, plaintiff assumed that those were documents intended to facilitate the loan agreement concluded between him and MC Probonds. Mr George was not present on all occasions when plaintiff was called upon to sign those documents. The first time he saw Mr George was at the magistrate's court, Stellenbosch in the course of the hearing of the eviction proceedings. He confirms that various advance payments were made to him whilst the transaction was pending.

[24] The plaintiff stated in his evidence that once the total funds would have been paid to him pursuant to the loan agreement, only then would the property be registered in the name of MC Probonds as security for the monies to be lent and advanced. Pursuant to this agreement the plaintiff would be required to repay the loan so advanced by way of monthly payments in amounts of R2,500-00. It never was his

intention at any stage to sell his property or to alienate his property to a third party. He was unaware that the documents he was required to sign at the offices of C George Attorneys were intended to facilitate transfer of the property to the Gillmores pursuant to a deed of sale purportedly concluded on 6 May 2009. He was unaware that his property was transferred to the Gillmores on 28 July 2009. The first time he became aware that his property had in fact been sold and subsequently transferred to the first and the second defendant was in January 2010 when steps were taken by the bank to have his property sold in execution. It is only then that he became aware that he was defrauded of his property, whereafter he went to lay a charge of fraud against Fisher and Josephs at Cloetesville S A Police Services under reference number CAS 471/01/2010.

THE EVIDENCE OF LORINDALL MAGDALENE WILSNACH

[25] The evidence of his wife corroborates his evidence in as far as the conclusion of the agreement at plaintiff's residence is concerned; the circumstances surrounding the signature of the purported deed of sale on 6 May 2009; and the subsequent several visits to the office of C George Attorneys where several further documents were signed. She further confirms that Mr George was not present on each occasion the plaintiff was called upon to sign documents at the offices of the aforementioned attorneys.

[26] Mr Clinton George, the conveyancer, and Christelle Adonis, the paralegal, contrary to what the plaintiff and his wife said in their evidence, testified that they personally explained to plaintiff each one of the documents the plaintiff was called upon to sign. In particular, they state in their evidence that it was explained to the plaintiff that

he is selling and transferring his property to the first and the second defendant and that he, Mr George, would be attending to the transfer of the property from plaintiff to the purchasers in the persons of the Gillmores pursuant to the deed of sale. The evidence of Crystal van der Westhuizen was merely to the effect that the plaintiff's wife often called their offices to enquire when transfer of the property would go through.

THE PLAINTIFF'S COMPLAINT

[27] The basis of the plaintiff's complaint, as set out in his particulars of claim, is that it never was his intention, at any stage, to sell his property. The plaintiff denies having concluded a deed of sale with the Gillmores in terms of which he is purported to have sold his property to the Gillmores at a purchase price in an amount of R350,000-00. He did not give anybody authority to conclude such an agreement on his behalf. All the documents he was required to sign subsequent to the conclusion of the loan agreement between him and MC Probonds were signed on an honest belief that they were documents intended to facilitate the loan agreement concluded between him and MC Probonds. The transfer of his property into the name of the Gillmores was as a consequence of a fraudulent scheme perpetrated by Fisher and Josephs operating under the name and style of MC Probonds.

[28] Apart from the plaintiff's complaint that the transfer of his property to the Gillmores was as a consequence of a fraudulent scheme, the plaintiff further complains that the agreement concluded between him and MC Probonds contravenes the provisions of the Alienation of Land Act, 68 of 1981, in particular, the provisions relating

to formalities set out in section 2 and the requirements relating to the content of such an agreement as provided in section 6 of the Alienation of Land Act. The other basis of the plaintiff's complaint is based on the allegation that the agreement on the basis of which the property was transferred contravenes various provisions of the National Credit Act, 34 of 2005.

[29] It is on the basis of evidence summarised in paragraphs [21] to [26] of this judgment, including documentary evidence referred to in this judgment, that I have to determine if the plaintiff has made out a case that the transfer of his property on the basis of the deed of sale purportedly concluded between him and the Gillmores was a consequence of fraudulent misrepresentation which resulted in him acting to his detriment and an ensuing prejudice.

<u>MISREPRESENTATION: LOAN AGREEMENT</u>

[30] The plaintiff stated in his evidence that although he was heavily indebted at the time he responded to an advertisement in *Die Son* newspaper, at no stage was it his intention to sell his property. Although he was prepared to use his property as security for a loan to be advanced, it never was his intention to transfer ownership of his property to MC Probonds or to any third party. His agreement that the property be transferred to MC Probonds for a period of three to six months, whereafter same would be transferred back to him, was intended to be a means of security for the loan to be advanced by MC Probonds. The undertaking by Fisher and Josephs, on behalf of MC Probonds, not to sell or lease such property for the duration of a period of three to six

months, is indicative of the fact that he never had an intention to transfer ownership of his property. All the further documents signed subsequent of the conclusion of the loan agreement, including those documents signed at the offices of C George Attorneys, were signed in an honest and *bona fide* belief that such documents were intended to facilitate the loan agreement concluded between him and MC Probonds. Whatever mandate MC Probonds and/or Fisher and Josephs may have had, is limited to the terms of the loan agreement.

DEED OF SALE

[31] The deed of sale on the basis of which the property was transferred to the Gillmores was purportedly concluded on 6 May 2009. Although the deed of sale bears the plaintiff's signature together with that of his wife, the plaintiff stated in his evidence that that document which purports to be a deed of sale is a document referred to in paragraph [7] of this judgment brought to him by Fisher and Josephs which they were required to sign without reading it and without delay as Fisher and Josephs still needed to proceed to Wellington to conclude a similar business. It purports to be a deed of sale concluded between plaintiff and his wife, on the one hand, and Reagan Gillmore and Brenda Felicia Gillmore, on the other hand. The plaintiff states in his evidence that he has never met the Gillmores before. The first occasion the plaintiff met the Gillmores was at the hearing of the eviction proceedings at the magistrate's court, Stellenbosch. He had never offered to sell his property to the Gillmores or any other party.

[32] No evidence was led at this trial as regards the circumstances under which Reagan Gillmore and Brenda Felicia GIllmore signed the purported deed of sale. The only evidence that there is as regards how it came about that the Gillmores signed the deed of sale is the evidence of Reagan Gillmore tendered at the magistrate's court, Stellenbosch in the course of the eviction proceedings. In those proceedings Reagan Gillmore testified that Fisher once proposed an arrangement with him in terms of which properties of persons who fell in arrears with their bond instalments would be transferred to him. The transaction relating to the transfer of plaintiff's property onto his (Gillmore's) is one of such transactions. He would be paid an amount of R10,000-00 for each such transaction. He testified that he never saw the property in dispute; had never been to the plaintiff's place to view the property; and have never intended to buy plaintiff's property.

[33] It is quite clear on the basis of the evidence of the plaintiff in this trial and the evidence of Reagan Gillmore at the eviction proceedings in the magistrate's court, Stellenbosch that neither the plaintiff, at any stage, had an intention to transfer ownership of his property nor had Reagan Gillmore had any intention of becoming an owner of the plaintiff's property. Accordingly, there could never have been a mutual intention and an agreement to permanently sell and transfer the property by plaintiff in the normal course of alienation of the land. All that the plaintiff had intended to do in his interaction with MC Probonds was to acquire a loan to protect his interest and the loss of his home. It is thus clear on the basis of the evidence that MC Probonds, represented by Fisher, fraudulently caused a deed of sale to be concluded between the

plaintiff and the Gillmores on the basis of which purported deed of sale plaintiff's property was transferred to the Gillmores.

[34] *Quartermark Investments (Pty) Ltd v Mkhwanazi & Another* 2014 (#) SA 96 (SCA) is authority for the proposition that where the underlying agreement to pass ownership is tainted by fraud, ownership will not pass despite registration of transfer. That the underlying agreement being tainted by fraud; the absence of an intention by plaintiff to transfer ownership; and the absence of any evidence of an intention to take transfer and to acquire ownership, it follows that the purported transfer of ownership from plaintiff to the Gillmores has no effect and the plaintiff remains the owner of the property.

N J Yekiso
Judge of the High Court